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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-898

NORVAL GOSS, ET AL.,
Appellants

v.

EILEEN LOPEZ, ET AL.,
Appellees

On Appeal from a Three-Judge
United States District Court
for the Southern District of Ohio,
Eastern Division

BRIEF OF APPELLANTS

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BRIEF OF APPELLANTS

OPINION BELOW

The opinion filed by the Three-Judge District Court for the Southern District of Ohio, Eastern Division, has not been reported. That opinion and order is reprinted in Appellant's Jurisdictional Statement as Appendix B.

JURISDICTION

The judgment of the District Court was entered on September 17, 1973. Appellants filed their notice of appeal with the District Court on November 9, 1973. The

Jurisdictional Statement was filed December 7, 1973. Probable jurisdiction was noted on February 19, 1974. The jurisdiction of this Court to review the judgment below is invoked pursuant to 28 U.S.C. §1253.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED:

1. United States Constitution, Amendment XIV §1. ". . . , nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

2. Section 3313.66 of the Ohio Revised Code:
"§3313.66 Suspension or expulsion.

The superintendent of schools of a city or exempted village, the executive head of a local school district, or the principal of a public school may suspend a pupil from school for not more than ten days. Such superintendent or executive head may expel a pupil from school. Such superintendent, executive head, or principal shall within twenty-four hours after the time of expulsion or suspension, notify the parent or guardian of the child, and the clerk of the board of education in writing of such expulsion or suspension including the reasons therefor. The pupil or the parent, or guardian, or custodian of a pupil so expelled may appeal such action to the board of education at any meeting of the board and shall be permitted to be heard against the expulsion. At the request of the pupil, or his parent, guardian, custodian, or attorney, the board may hold the hearing in executive session but may act upon the expulsion only at a public meeting. The board may, by a majority vote of its full membership, reinstate such pupil. No pupil shall be suspended or expelled from any school beyond the current semester."

QUESTIONS PRESENTED

The following questions were presented by the jurisdictional statement and will be considered in this brief:

1. Where the United States Supreme Court has concluded that the importance of education alone will not elevate education to the status of a fundamental right guaranteed either explicitly or implicitly by the Federal Constitution and where the lower court has recognized that education is not a property right, may a district court hold that education is a liberty protected by the Federal Constitution solely on the basis that it is important?
2. Is a statute, providing for a temporary limited suspension by a principal of a local school, which has not been determined to result in condemning students to suffer grievous loss, subject to the procedural protections required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution?
3. Can a State create a liberty which is recognized as being subject to protection by the Fourteenth Amendment of the United States Constitution?

STATEMENT OF THE CASE

Appellees at the time of filing their complaint were a group of students enrolled in several different schools located in Columbus, Ohio (A. 5-10) They were suspended during a period of time in which disruptions were occurring or had occurred in the schools (A. 86-102; 123, 127, 131, 135) Four of the plaintiffs at the time of suspension were beyond the compulsory attendance age (A. 45). The complaint asserted that Section 3313.66 of the Ohio Revised Code and the rules adopted by the

Board of Education violated Appellees' constitutional and statutory civil rights. Jurisdiction of the District Court was asserted under the Civil Rights Act of 1871, 42 U.S.C. §1983, 28 U.S.C. §§1343(3), 2201 and 2202 and the Due Process Clause of the Fourteenth Amendment. The action was prosecuted as a class action.

Appellants contested the request by Appellees that a three-judge court be convened claiming that a question did not exist such as necessitated convening such a court. (A. 25) At the same time Appellants also filed a motion to dismiss the complaint asserting in part that the complaint did not state facts upon which relief could be granted. (A. 15) No specific ruling was ever made of this branch of the motion.

A three-judge court was ordered convened by an order of the Chief Judge of the United States Court of Appeals for the Sixth Circuit filed October 4, 1971. (A. 34-35)

Following the convening of the three-judge court, Appellants, at the request of the court, while not abandoning the motion to dismiss previously filed, filed an answer containing several defenses. The answer denied a proper assertion of the Court's jurisdiction. (A. 37)

The cause was tried on July 16, 1973, during which time Appellants presented the testimony of the Superintendent of Schools by deposition, explaining the manner in which suspension procedures were administered within the school system. Testimony in the form of a deposition by one of the principals of the involved schools was also presented. He explained the disruptive situation that occurred at Marion-Franklin High School which led to the suspensions. During this period of time, we find such things as refusals to go to class, refusals to clear the halls, blocking the stairways, refusal to follow directions and outside agitation all occurring. (A. 86-102)

Finally, Norval Goss, Director of Pupil Personnel, demonstrated through an exhibit he had prepared that subsequent to the suspensions at bar, the involved students proceeded with their education, maintaining the same or better point hour average than they had prior to being suspended. (A. 286)

All Appellees, either graduated or moved on to the next grade (A. 125, 133-134, 143, 152-153, 154)

In addition to contesting their involvement in particular incidents which occurred in the involved high schools, Appellees presented several psychologists and a guidance counselor who testified in general terms that a suspension can harm a student. Neither the psychologists or the guidance counselor had any knowledge respecting the involved students. They did not interview any of the students and had not studied their records. They presented no evidence that the involved students representing the class had sustained harm of any type. (A. 161-162; 176-177 188) The testimony of the psychologist and guidance counselor proceeded over objection and a motion to strike.

Following the trial, Appellants on July 17, 1973, filed a formal motion to dismiss the case for failure on the part of Appellees to establish that they had been deprived of a federally protected statutory right or a right guaranteed by the Fourteenth Amendment of the United States Constitution and because of the failure on the part of Appellees to establish, by the proper degree of proof, that Section 3313.66 of the Ohio Revised Code was unconstitutional. (A. 287) No specific ruling on this motion was ever made.

On August 31, 1973, Appellees, filed an amended complaint naming substituted parties defendant. At the request of the Court, Appellants filed an answer on be-

half of the substituted parties. In addition to setting forth a series of defenses, the answer denied that the Court was properly exercising its jurisdiction. (A. 303)

The Court rendered its opinion and order on the same day that the answer was filed. The Court, with respect to all plaintiffs, found that Section 3313.66 of the Ohio Revised Code violated the Due Process Clause of the Fourteenth Amendment. Nevertheless, in its opinion, the Court stated that school administrators had acted only to restore order and discipline in their schools, and further, the court found no suspension to be unwarranted. (Jurisdictional Statement p. 65)

SUMMARY OF ARGUMENT

The instant case presents a situation in which it is important from the outset to recognize that the term "education," where questions of Constitutional guarantees and protections are presented, can be used in two distinctly different contexts. Education is used to describe the educational system and participation in a particular system or school. Apart from education in a participation context is "education" in the larger philosophical sense of the right to pursue knowledge and the right of parents to control and direct their children's destiny. In using the term in this latter sense, we are concerned with a liberty interrelated to the right of free choice. It is education in this larger sense, of the pursuit of knowledge independent of any system, which this Court has recognized as being protected by the Constitution.

Education in the sense of participation in a state educational system or a particular school is not, in and of itself, a matter of constitutional right. This is not to say that a student has no constitutional rights in his relationship to the system. Certainly, the student retains all the clearly identified constitutional rights. However, absent a violation of those identifiable constitutional rights, participation in a public educational system, standing alone, is not another constitutional right. The state creates a system of public education and as a part of the system establishes a system of internal student discipline. The system is created by the state to serve its purposes of protection and perpetuation. Discipline and order are integral parts of, and necessarily essential to, the internal management of the system.

In answering the questions posed by the Constitutional challenge to Section 3313.66 of the Ohio Revised Code, it is important to recognize and maintain the above distinction. Suspension, and even expulsion, standing alone relate only to participation in a particular school or educational system. Partipation in a particular school or educational system is not a right of liberty or property protected by the Constitution. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 36 L. Ed. 2d 16, 44 (1973).

The challenged statute (Section 3313.66 of the Ohio Revised Code) represents a proper legislative enactment in an area (the internal management of its system) resting within the province of the States. Particularly is the above analysis and the conclusions that follow true in the present case where questions relating to violations of rights of free speech and free choice, and questions relating to discrimination, race and unequal application were missing. It is only where a statute impinges upon a fundamental (substantive) right protected by the Constitution sharply implicating the substantive right, that a right to an immediate hearing arises. Participation in a particular system or form of system is not one of

those fundamental or substantive rights, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 36 L. Ed 2d 16, 59-60, concurring opinion of Justice Stewart.

The Government function (internal management of its system) involved in this case did not touch and sharply implicate any basic right of liberty or property possessed by Appellees. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 36 L. Ed. 2d 16, 44 (1973). Questions relating to the internal management of the educational system and the form that management should take should have been directed to the legislature. *Jackson v. Hepenstall*, 328 F. Supp. 1104 (1971) and *Negron v. Wallace*, 436 F. 2d 1139, 1141 (1971). The definition of the relationships that will exist between the managers of the educational system and participants in the system are legislative functions. *San Antonio Independent School District v. Rodriguez*, 411 U.S.l 1, 36 L. Ed. 2d 16, 41-43 (1973).

Even if this Court found that student participation in a State educational system is a liberty protected by the Due Process Clause, then the liberty is violated only where the individual suffers a severe detriment or grievous loss. The record of the instant case clearly demonstrates the complete absence of a severe detriment or grevious loss suffered by any student.

The decision of the District Court should be reversed.

ARGUMENT

(a) THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION DOES NOT ESTABLISH PARTICIPATION AS A STUDENT IN A STATE SYSTEM OF PUBLIC EDUCATION TO BE A MATTER OF CONSTITUTIONAL RIGHT.

IMPORTANCE ALONE DOES NOT CREATE SUCH A RIGHT.

The creation of State systems of public education has not served to create a new Constitutional due process right by reason of the opportunity afforded students to participate in such systems. This is not to say that through becoming a student, an individual forfeits Constitutional rights in his relationship to the system. The present case presents a situation in which the clearly identified Constitutional rights possessed by Appellees were not involved. There was no action by the State against their rights of free speech; the State was not shown to have discriminated against them; no action was taken against their right of free choice; there was no showing that an improper consideration (suspect criteria) such as race was involved and no showing that the law was being unequally applied. Thus, the three-judge Federal District Court faced with a situation wherein the State was performing the internal function of managing those who wished to participate in its system, found that a statute (Section 3313.66 of the Ohio Revised Code), which restricted the powers of management possessed by school administrators, violated the Due Process Clause of the Fourteenth Amendment.

In 1972, this Court in *Board of Regents v. Roth*, 408 U.S. 564, at 569-570, 33 L. Ed. 2d 548, (1972) stated very clearly that the requirements of procedural due process do not protect every interest:

> " 'The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite.' " See Com-

ment, "Liberty," "Property" and Procedural Due Process, 5 Conn. L. Rev. 685 (1972).

The chief factor in every situation relates not to the importance of the interest involved, but to whether or not a fundamental right of liberty or property is at stake. *Roth*, 408 U.S. 564, 571 (1972). This approach does not represent a departure from this Court's prior views as to the application of the Due Process Clause. Paul G. Kauper, "Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten": The *Griswold* Case, 64 Mich. L. Rev. 235, 257 (1965-66).

In 1973, this court in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 36 L. Ed. 2d 16, 44, (1973) in addressing itself to the issue relating to whether or not education in the sense of the form of the state system and student participation in that system is a matter of Constitutional right concluded:

> "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. • • •"[1]

In the context of the pure fact situation presented by the instant case, in which the constitutional question relating to an asserted violation of the Due Process Clause is raised, the above principle, namely, that participation in the State educational system is neither explicitly nor implicitly guaranteed by the Constitution,

[1] The above principle has been recognized in later cases. *Sturgis v. State of Washington*, 368 F. Supp. 38, 41, affirmed 94 S. Ct. 563 (1973). It has also been recognized in *Stock v. Texas Catholic Interscholastic League*, 364 F. Supp. 362, (1973) and *Kister v. Ohio Board of Regents*, 365 F. Supp. 2739 (1973). Even prior to this Court's decision in *Rodriguez*, 36 L. Ed. 2d 16, 44, (1973) it had been recognized that education was not one of the fundamental rights guaranteed by the Constitution. *Flemming v. Adams*, 377 F. 2d 975, 977 (1967) and *Johnson v. Hackett*, 284 F. Supp. 933, 939 (1968). The commentators are also showing recognition, James Mize, *San Antonio Independent School District v. Rodriguez*: A study of Alternatives Open To State Courts, 8 University of San Francisco L. Rev. 90, 100 (1973).

takes on particular significance. If this Court remains committed to the philosophy of interpretation of the Due Process Clause that rests upon selective incorporation into the Fourteenth Amendment of certain of the enumerated rights found in the Bill of Rights, in addition to other rights not found specifically enumerated but secured as being "penumbras of the Bill of Rights," then, the Federal District Court in the instant case was not confronted with a statute which impinged upon those rights. *Griswold v. Connecticut*, 381 U.S. 479, 499, 14 L. Ed. 2d 510, 524, (1965), concurring opinion of Mr. Justice Harlan and Paul G. Kauper, "Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The *Griswold* Case, 64 Mich. L. Rev. 235, 257 (1965-66). The result in *Rodriguez*, 411 U.S. 1, 36 L. Ed. 2d 16, 44 (1973), takes on further significance when it is remembered that the Due Process and Equal Protection Clauses are not mutually exclusive; *Bolling v. Sharpe*, 347 U.S. 497, 499, 98 L. Ed. 884, 886 (1954). Certainly that principle must hold true where the issue to be decided is whether a liberty or property right is involved.

Roth, 408 U.S. 564 (1972) and *Rodriguez*, 411 U.S. 1 (1973) support a conclusion that this Court has not departed from that approach. That being the case, the District Court was not faced with a situation in which the students' rights of liberty or property were being violated. The difficulty arises due to the District Court's willingness to determine the reach of the Due Process Clause based upon a completely different approach, an approach rejected by this Court. The District Court quite clearly concluded that the importance of education (participation in the state educational system) is sufficient to elevate it to the status of a liberty protected by the Fourteenth Amendment. (See Jurisdictional Statement p.

60). In *Rodriguez*, 411 U.S. 1, 36 L. Ed. 2d 16, 41-42, (1973) this Court rejected the concept that the reach of the Fourteenth Amendment should be determined on the basis of the importance of a particular subject matter or area. Importance does not identify what is and what is not a constitutionally protected right. The use of such a factor would ultimately lead to a conclusion that the Due Process Clause of the Fourteenth Amendment applies to everything. Such a course this Court has declined to follow. A further rejection of the factor of 'importance' as a determining constitutional element can also be found in *Shapiro v. Thompson*, 394 U.S. 618, 661, 22 L. Ed. 2d 600, 631 (1969) and *Lindsey v. Normet*, 405 U.S. 56, 31 L. Ed. 36, 74 (1972).

The question whether or not a person's pursuit of knowledge is a Constitutionally protected freedom of choice or liberty is not to be confused with compulsory attendance in a State created educational system. Pure questions relating to the manner in which a public school system will be internally managed, as well as the power to be given the managers of the system, are questions resting with the State. *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 896, 6 L. Ed. 2d 1230, 1236 (1961). Whether or not there should be enforced discipline; the form that discipline should take; the person that will enforce such discipline; are questions properly directed to the State legislative body. The Fourteenth Amendment does not grant to federal courts powers to establish and set the limits of such a policy. *Dandridge v. Williams*, 397 U.S. 471, 486, 25 L. Ed. 2d 491, 502 (1970) and *Communist Party v. S.A.C. Board*, 367 U.S. 1, 72, 6 L. Ed. 2d 625, 675 (1961).

This case does not involve questions of race and invidious discrimination; it does not involve questions

surrounding the First Amendment, it does not involve an invasion of the right of free choice, including the right of parents to control their children. The Due Process Clause of the Fourteenth Amendment was not violated.

The present case is an ideal example of a situation in which those rights guaranteed by the Due Process Clause were never implicated. The instant case fits squarely within the admonition of this Court in *Epperson v. Arkansas*, 393 U.S. 97, 104, 21 L. Ed. 2d 228, 234, (1968)

> "By and large, public education in our nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values. * * *" (Compare *Ware v. Estes*, 328 F. Supp. 657, aff'd. 458 F. 2d 1360 (1972) and *Holroyd v. Eibling*, 116 Ohio App. 440, 445-46 (1962).

The District Court while recognizing that the school administrators were acting to restore order and discipline in their respective schools, struck down Section 3313.66 of the Ohio Revised Code in the interest of establishing a policy with respect to discipline in the schools; a question properly directed to the State legislature. (See Jurisdictional Statement P. 65) This it did in a situation where no prior hearing was required under the statute.

Moreover, the District Court's conclusion that participation in a public school system created by the State legislature is a liberty protected by the Due Process Clause based on the fact that education is important, does not appear to be supported by any historical analysis of the concept of education. Historically, education

(apart from participation) is not something which emanates from the State, but is a matter of individual and parental concern. This concept finds expression in *Meyer v. Nebraska*, 262 U.S. 390, 400, 67 L. Ed. 1042, 1045 (1923).

> "***. Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; ***."

The concept is further explained in *Pierce v. Society of Sisters of Holy Names*, 268 U.S. 510, 535, 69 L. Ed. 1070, 1073 (1925):

> "The fundamental theory of 'liberty' upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty to recognize and prepare him for additional duties."

The perspective from which the educational system created by the State must be viewed is one which recognizes that the interest of the State in creating the system is not solely or basically for the purpose of furthering the interests of the individual, but to protect itself:

> "The ultimate justification for state compelled school attendance is nothing other than that the whole population must have training adequate to enable it (the State) to defend its boundaries and to sustain the activities which are indispensable to its material life. Attendance at school is no more required in the sole interest of the individual than is service in the armed forces. Both are limitations on freedom of choice imposed by practical necessity." George K. Gardner, "Liberty, The State, and The School," 20 Law and Contemporary Problems, 184, 193 (1955). (material added)

In terms of the historical analysis of education as an individual pursuit, attendance or participation in the State educational system can be viewed as a limitation upon one's liberty rather than as creating a new right of liberty. The District Court's conclusion that participation on a compulsory basis in a State educational system creates a constitutional liberty is not correct. It does not even comport with either the older or newer understandings as to the meaning of the term liberty.[2]

No need exists for taking such a view of liberty as was taken by the District Court in this case. Public schools should only be viewed as a competing system in which the State seeks to achieve the ends of protecting itself and insuring its perpetuation. Public schools were not, and should not, be viewed as something created in the sole interest of the individual. George K. Gardner, "Liberty, The State, and The School," 20 Law and Contemporary Problems 184, 193 (1955). Recognition that public schools were created by the State in the interest of the individual leads directly to the conclusion that a limitation has been placed on the individual's freedom of choice.

It is particularly important, as is this analysis important, that an individual's freedom of choice remain. Education today is in an evolutionary state. The shape it will take for the future is not leaning toward a conclusion that the individual must look to the State to pro-

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[2] Shattuck, "(The True Meaning of the Term 'Liberty' in Those Clauses in the Federal and State Constitution Which Protect Life, Liberty and Property,'" 4 Harvard L. Rev. 365 (1890-91) Charles A. Reich "The New Property," 73 Yale L.J. 733, 771, 774 (1964). Liberty is and must remain more than something "deliberately constructed by society." The "liberty" set forth in the Due Process Clause flows from natural law. John Stuart Mill, "Utilitarianism and Other Writings," World Publishing Company 126, 137-138 (1962); Corwin, "The Constitution And What it Means Today," Princeton University Press, 391-395 (1973) and *Poe v. Ullman*, 367 U.S. 497, 543, 544, 6 L. Ed. 2d 989, 1019-1020 (1961) dissenting opinion of Justice Harlan.

tect his interest. Serious questions are being raised, none of which support a conclusion that an individual's interest in education is something derived from the State. Alexander M. Bickel, "The Supreme Court and the Idea of Progress," Harper and Row (1970) 103-176, Christopher Jencks, "Is the Public School Obsolete" The Public Interest 18 (1965-66); Christopher Jencks, "Inequality: A Reassessment of the Effect of Family and Schooling in America," (New York: Basic Books, 1972 and Daniel P. Moynihan, "Maximum Feasible Misunderstanding," The Free Press, New York, 167, 194-195 (1969.)

Section 3313.66 of the Ohio Revised Code is not a statute which impinges upon "liberty," broadly defined. It does not shock the conscience of mankind to say that the administration of order and discipline with a public school system is an internal matter within the province of local school administrators and parents.

Appellees in this situation did not meet the burden of demonstrating that the school board rules and the State statute served a purpose other than legitimate administrative and management concerns. *Tinker v. Des Moines Community School District,* 393 U.S. 503, 526, 21 L. Ed. 2d 731, 749. (1968)

The District Court, for practical purposes, agreed. (Jurisdictional Statement p. 65). The statute under attack (Section 3313.66 of the Ohio Revised Code) never lost its presumption of constitutionality; it did not impinge upon constitutionally protected rights. *Alabama State Federation of Labor v. McAdory,* 325 U.S. 450, 465, 89, L. Ed. 1727, 1737 (1944) and *Becker v. Levitt,* 489 F. 2d 1087, 1091 (1973).

A violation of the Due Process Clause guarantees of liberty and property did not exist in this case.

(b) A FUNDAMENTAL RIGHT PROTECTED BY THE DUE PROCESS CLAUSE IS VIOLATED ONLY WHERE A PERSON SUFFERS A SEVERE DETRIMENT OR GRIEVOUS LOSS.

Analysis of this Court's opinions in litigation where it is claimed that the Due Process Clause of the Fourteenth Amendment is violated, support the conclusion that for a violation of a fundamental right to occur, one must establish that not only is a fundamental right involved, but that one has suffered a severe detriment as a result of the governmental function under review. In *Morrissey v. Brewer,* 408 U.S. 471, 481, 33 L. Ed. 2d 484, 494 (1972) the Court said:

> "Whether any procedural protections are due depends on the extent to which an individual will be condemned to suffer grievous loss.' * * *.[3]

Goldberg v. Kelly, 397 U.S. 254, 264, 25 L. Ed. 2d 287, 297 (1970) contained the following expression:

> "Thus the crucial factor in this context—a factor not present in the case of the black-listed government contractor, the discharged government employee, the taxpayer denied a tax exemption or virtually anyone else whose governmental entitlements are ended—is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks inde-

[3] Subjecting a secondary school student to a one to ten day suspension as a part of managing and controlling the system is no more drastic in a constitutional sense than reasonable corporal punishment. Such suspension has no greater impact than does the nonretention of a teacher, *Board of Regents v. Roth,* 408 U.S. 564, 33 L. Ed. 2d 548, 559 (1972). Compare with the types of personal impacts recognized by the court in *Suarez v. Weaver,* 484 F. 2d 678, 680 (1973), "the distinction between charges which trigger procedural protection and those that do not has yet to be drawn * * *. On the other hand, past cases establish that charges which may become public and which suggest immorality, dishonesty, mental deficiency, or abnormal emotional imbalance invoke due process considerations."

pendent resources, his situation becomes immediately desperate. * * * " See also *Skinner v. Oklahoma*, 316 U.S. 535, 86 L. Ed. 1665, (1942) *Sniadach v. Family Finance Corp.*, 395, U.S. 337, 340-342, 23 L. Ed. 2d 349, 353, 354, (1969) and *Roe v. Wade*, 410 U.S. 113, 156. (1973)

The thrust of these cases is to the effect that even where a protected interest is involved, a prior hearing is not mandated where the person holding the interest is not subject to "severe detriment" or the person is not "condemned to suffer grievous loss" as a result of government action. Thus, it is only government action directed toward government entitlements or benefits which directly and sharply implicate basic elements of life, liberty or property that will require a prior hearing.

The record of this case does not demonstrate that the involved statute has a devastating impact on any person holding a clearly identified interest within the contemplation of the term "liberty" or "property" such as would necessitate the holding of a prior hearing before the principal could act. The students directly involved in this case all either graduated from school on time or ahead of time, or moved on to the next grade. The point hour ratio they each maintained either remained the same or in some cases slightly improved following the suspensions (A. 125, 133-134, 143, 152-153, 154 and Deft. Ex. B, A. 286)

The pattern of lower federal court decisions that have concerned themselves with questions surrounding the suspension of students essentially demonstrate that those courts, without addressing the question of participation in a particular State system or school, have not been able to find a liberty or property right so sharply implicated as to require a hearing before the principal or school administrator acts. where the suspension is for a

period of from one to ten days. No student is subjected to a severe detriment or condemned to suffer a grievous loss. *Linwood v. Board of Education of Peoria*, 463 F. 2d 763, cert. denied, 409 U.S. 1027 (1927) seven days suspension; *Tate v. Board of Education of Jonesboro, Ark.*, 453 F. 2d 975 (1972) five days suspension; *Dunn v. Tyler Independent School Dist.*, 460 F. 2d 137 (1972) ten day suspension; *Hatter v. Los Angeles City High School District*, 310 F. Supp. 1309 (1970) eight day suspension; *Farrell v. Joel*, 437 F. 2d 160 (1971) ten day suspension;[4] *Banks v. Board of Public Instruction of Dade County*, 314 F. Supp. 285 (1970) ten day suspension.

However, the threshold question with respect to whether or not a recognized right of liberty or property protected by the Constitution is implicated, is not answered through the application of a balancing process to the interests involved. *Roth*, 408 U.S. 564, 571, 33 L. Ed. 2d 548, 557 (1972).[5]

Section 3313.66 of the Ohio Revised Code served a legitimate State function, and as such served as a limitation on the broad inherent power possessed by Appellant's administrators and as a limitation on the stat-

[4] Farrell, 437 F. 2d 160, 162 (1971) probes the question relating to whether or not the federal court should ever have intervened. That question is a worthy one. *Tinker v. Des Moines Community School Dist.*, 393 U.S. 503, 514-515, 21 L. Ed. 2d 731, 742, (1968) concurring opinion of Justice Stewart. *Black Coalition v. Portland School Dist.*, NO. 1, 484 F. 2d 1040, (1973) discusses the issue in terms of short versus long term suspension. In that same vein is *Murray v. West Baton Rouge Parish School Bd.*, 472 F. 2d 438 (1973), both concluding that short term suspensions do not violate the Due Process Clause and do not require a prior hearing.

[5] Compare *Cook v. Carlson*, 364 F. Supp. 24 (1973) where the search was for the function involved, as well as the property interest, with a case like *Givens v. Poe*, 346 F. Supp. 202 (1972) where even though short term suspensions were recognized not to violate the Constitution, the balancing test comes into full play. The internal governmental function involved receives no real consideration. It is only where fundamental rights are sharply implicated that an immediate hearing is required. Even though the instant situation did not involve a fundamental right, relief through several avenues was available. See Section 2506.01 of the Ohio Revised Code.

utory power they possessed by virtue of Section 3313.20 of the Ohio Revised Code.

Leaving aside the pure question of where education, as viewed in a dual context fits or doesn't fit within the framework of the Constitution, it cannot be concluded that a basic right of life, liberty or property is either initially or otherwise drawn in question through the governmental function involved, as regulated by Section 3313.66 of the Ohio Revised Code. Even though welfare standing alone did not fit into the category of recognized fundamental rights protected by the Constitution, the right to life was found to be otherwise sharply implicated when the benefits provided by welfare were terminated. *Dandridge v. Williams*, 397 U.S. 471, 25 L. Ed. 2d 491 (1970) and *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287 (1970). A similar comparison analysis applied to the record of the instant case, even though participation in a particular system or school is not guaranteed by the Constitution, does not demonstrate that any other recognized basic right of liberty or property was involved. No student representing the class was condemned to suffer grievous loss of a recognized right. *Rodriguez*, 411 U.S. 1, 36 L. Ed. 2d 16, 44 (1973). At no time did liberty as it relates to "education" in the personal sense discussed in *Meyer v. Nebraska*, 262 U.S. 390, 67 L. Ed. 1042 (1923) and *Pierce v. Society of Sisters of Holy Name*, 268 U.S. 510, 69 L. Ed. 1070 (1925), become involved in this case, either directly or indirectly. This case only involved the school systems internal maintenance of order and discipline. *Steier v. New York Education Commissioner*, 271 F. 2d 13, 18-19 (1959). The evidence presented in this case, does not offer any reason to change such conclusion.

Interests of liberty or property were not terminated or so sharply implicated either initially or at a later time by reason of the action taken as to require a prior hear-

ing. The students' right to acquire useful information was not being terminated. Their free choice right to attend a public or private school was not involved. They had those rights before the suspensions and retained those rights during and after the suspensions. In fact, the involved students in reality proceeded on with their participation in the system graduating or advancing at essentially the same or better point hour ratio than they had previously maintained. (A. 125, 133-134, 143, 152-153, 154 and Deft. Ex. B, A. 286). The function involved was the government's management and control of the internal affairs of a system it had established. The vitality of that function as a legitimate local concern has previously been recognized by this Court. *Epperson v. Arkansas*, 393 U.S. 97, 104, 21 L. Ed. 2d 228, 234 (1968). *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 507, 21 L. Ed. 2d 731, 738 (1968). *Healy v. James*, 408 U.S. 169, 192 (1972). That concept has also received recognition from the Circuit Courts. *Medera v. Board of Education*, 386 F. 2d 778 (1967); *Blackwell v. Issaquena County Board of Education*, 363 F. 2d 749, 753 (1966) and *Tate v. Board of Education*, 453 F. 2d 975, 978 (1972). The District Court clearly recognized that Appellants were performing that function. (Jurisdictional Statement p. 65). That function is best described by this Court in *Cafeteria Workers v. McElroy*, 367 U.S. 886, 896, 6 L. Ed. 2d 1230, 1236. (1961).

> "Moreover the governmental function operating here was not the power to regulate or license, as lawmaker, an entire trade or profession, or to control an entire branch of private business, but, rather, as proprietor, to manage the internal operation of an important federal military establishment."

The instant situation is analogous. Here the State, as proprietor of the system it had established, was acting to preserve order and discipline internally among partici-

pants within that system. Its actions were not directed against the type of entitlement recognized in *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287, (1970) *Bell v. Burson*, 402 U.S. 535, 29 L. Ed. 2d 90 (1971) and *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 23 L. Ed. 2d 349 (1969).

The strong statements of this Court and lower federal courts recognizing the comprehensive authority of school administrators, particularly where no other specific area of the Constitution is involved, either directly or indirectly, is nothing more than a traditional recognition that in the area of discipline and control, this Court is faced with an area of action resting exclusively with the States. That recognition is best summarized by Justice Harlan in his dissenting opinion in *Tinker v. Des Moines Community School District*, 393 U.S. 503, 526 L. Ed. 2d 731, 749, (1968):

> "* * * At the same time I am reluctant to believe that there is any disagreement between the majority and myself on the proposition that school officials should be accorded the widest authority in maintaining discipline and good order in their institutions. To translate that proposition into a workable constitutional rule, I would, in cases like this, cast upon those complaining the burden of showing that a particular school measure was motivated by other than legitimate school concerns — * * *." (See also *Rumler v. Board of Sch. Tr. for Lexington Co. Dist. No. 1*, 327 F. Supp. 729, 743-744, aff'd 437 F. 2d 953 (1971), and the analysis contained therein).

The difficulty in the instant case relates not to the fact that the statute was motivated by improper concerns, but to the fact that the District Court was attempting to perform a function which rests with the State legislative body. The District Court went through

two hearings, and concluded that "the evidence establishes that the various school administrators acted to restore order and discipline in their schools, and found:

> "This holding does not reflect upon the wisdom or propriety of the suspensions themselves. Phillip Fulton's testimony fully supports the suspensions he imposed. ***" (Jurisdictional Statement p. 65),

Such findings are direct evidence that what was involved in this case was not a problem surrounding the Due Process Clause, but whether or not a change should be made in the disciplinary power and practices of the school administrators. That problem should have been directed to the legislature. The burden of demonstrating that the statute was motivated by other than legitimate concerns was not met.

No person involved in this case had a basic right of liberty or property sharply drawn in question; no person was condemned to suffer grievous loss of a basic right of liberty or property.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the judgment of the District Court should be reversed.

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